Supreme Court, U.S.
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No. 91-1455

In The

# Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

*Petitioner,*

versus

LOUISIANA STATE BOARD OF DENTISTRY, ET AL.,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CORNELIUS R. HEUSEL*
S. MARK KLYZA
KULLMAN, INMAN, BEE, DOWNING & BANTA
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

*Counsel for Louisiana State Board of Dentistry, et al.,*

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Shortly after the commencement of this §1983 civil rights suit, the district court abstained from hearing Petitioner's numerous constitutional claims against the Louisiana State Board of Dentistry, its members, and its counsel, pending the completion of Petitioner's disciplinary proceeding and judicial review in the state system. Thereafter, the Louisiana Supreme Court sustained a due process claim raised by Petitioner, reversed the Board's decision and ordered a *de novo* hearing of Petitioner's disciplinary proceedings. *Allen v. Louisiana State Board of Dentistry*, 543 So. 2d 908 (La. 1989). Despite the fact that state court proceedings remained ongoing, Petitioner moved to reopen this §1983 federal suit so that the parties could litigate piecemeal whether the Louisiana Supreme Court's ruling rendered Respondents liable on one of Petitioner's twenty-four civil rights claims and entitled him to damages and interim attorney's fees.

The question presented is whether, under *Colorado River* abstention, the district court's decision to deny Petitioner's motion to lift the stay because state court proceedings are still ongoing was a proper exercise of the district court's discretion demonstrating "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" or whether it constituted an abuse of discretion.

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## STATEMENT OF THE CASE

In 1985, Respondent, Louisiana State Board of Dentistry ("Board") brought formal administrative charges against Petitioner alleging various violations of the Louisiana Dental Practice Act, La. Rev. Stat. Ann. §37:1751 *et seq.* In response to those charges, Petitioner filed the present 42 U.S.C. §1983 action against Respondent Board, its members, and its counsel, Guy Wootan ("Wootan"), alleging various violations of due process. Petitioner sought injunctive relief, four million dollars in damages, and attorney's fees. Petitioner's suit was filed on February 13, 1986, eight days before his disciplinary hearing.

Following the hearing, the Board sustained twenty-seven of the forty-five violations charged against Petitioner, imposed fines totaling $25,500 for the violations, ordered the suspension of Petitioner's license for ten years with an additional ten years probation, and ordered him to pay costs of $61,478.19. *After* reaching these determinations, the Board instructed Wootan to prepare its findings of fact and conclusions. Subsequently, Petitioner twice amended his §1983 complaint. In his Second Supplemental and Amended Complaint, which is presently before the district court, Petitioner sues the Board, its members, and Wootan, in both their individual and official capacity, alleging approximately twenty-four civil rights claims.[1] [Resp. App. 1A - 17A.] Petitioner seeks declaratory and injunctive relief, thirty-three and a half million dollars in damages and attorney's fees.

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[1] For ease of reference, the Defendants will be collectively referred to as "Respondents."

Because state proceedings were pending as of March, 1987, the district court abstained following a motion to dismiss filed by Respondents. The Fifth Circuit affirmed the abstention, finding Petitioner had failed to exhaust his state appellate remedies. *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100 (5th Cir. 1988) (*Allen I*). With regard to Petitioner's §1983 claims for monetary damages, the Fifth Circuit affirmed the district court's abstention based on this Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

On May 1, 1989, the Louisiana Supreme Court ruled, *inter alia*, that Petitioner's right to due process had been violated as a result of the "commingling of functions" by Wootan who served as the Board's prosecutor at Petitioner's disciplinary proceedings and subsequently as drafter of the Board's decision. *Allen v. Louisiana State Board of Dentistry*, 543 So. 2d 908 (La. 1989) (*Allen II*). The Louisiana Supreme Court reversed the Board's decision and remanded the case for a hearing *de novo* on the existing factual record before a committee composed of dentists who had no involvement in the initial disciplinary proceeding.

On July 12, 1990, Petitioner moved the district court to lift its stay for the following purposes: (1) grant partial summary judgment on his "commingling claim" which constitutes one of his 24 civil rights claims in his Second Supplemental and Amended Complaint; (2) "set this matter for jury trial to determine the amount of damages recoverable by Plaintiff . . . ";[2] (3) award Petitioner an

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[2] Petitioner asserts that he "does not seek damages at this stage; he is willing to await the outcome of the new

(Continued on following page)

interim award of attorney's fees pursuant to 42 U.S.C. §1988. On October 16, 1990, the district court denied Petitioner's motions, holding that the stay must remain in place until completion of the state proceedings.

Following Petitioner's appeal, the Fifth Circuit affirmed, holding that the district court had not abused its discretion in refusing to lift the stay. *Allen v. Louisiana State Board of Dentistry*, 948 F.2d 946 (5th Cir. 1991) (*Allen III*). [Pet. App. 1-A - 10-A.] In reaching its conclusion, the appellate court determined that the identical factors which led it to affirm the district court's stay in *Allen I* still have an "overwhelming presence." Accordingly, Petitioner's success on his commingling claim in the state courts, by itself, was insufficient to establish that the district court abused its discretion in refusing to lift the stay while state proceedings are still pending. Additionally, the court noted that "lifting the stay for the sole purpose of determining attorney's fees would directly contribute to the very piecemeal litigation abstention was in part designed to prevent." [Pet. App. at 2-A.]

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administrative hearing to determine quantum, . . . " [Pet. at 4.] By so arguing, Petitioner attempts to rewrite his pleadings to the district court. As reflected by Petitioner's appendix, he asked the district court to lift the stay in order to determine liability, *damages*, and attorney's fees against Respondents. [Pet. at 19-A, 20-A.]

## REASONS FOR DENYING THE WRIT

### A. *Allen III* Does Not Conflict With Decisions Of This Court Or Other Circuit Courts Of Appeal.

As set forth in detail by the Fifth Circuit, the district court's ongoing abstention in the present case is fully consistent with the teachings of *Colorado River* which provide for abstention based on "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* Citing *Colorado River Water Conservation District v. United States*, 424 U.S. at 817. The Fifth Circuit noted the factors identified in *Colorado River* and its progeny which weigh in favor of abstention. These factors included

> "the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, and the order in which jurisdiction was obtained by the concurrent forums" in addition to consideration of the state or federal source of the governing law and the extent to which "the state court proceedings could adequately protect the federal plaintiff's rights."

*Id, citing Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100, 104 (5th Cir. 1988). The court further noted that the *Colorado River* test should "be applied in a pragmatic, flexible manner with a view of the realities of the case at hand." *Id.*

As noted by the Fifth Circuit, the realities of the present case are essentially the same as found in *Allen I*. The state court proceedings are significantly more developed than the federal proceedings and, as indicated by the Louisiana Supreme Court's rulings, the state courts are adequately protecting Petitioner's interests, which, as Petitioner notes,

includes allowing him to continue to practice. *Allen v. State Board of Dentistry*, 519 So. 2d 1161 (La. 1988); *Allen v. State Board of Dentistry*, 543 So. 2d 908 (1989). Also, Petitioner's numerous remaining §1983 claims are intertwined with state proceedings. Lastly, Petitioner's suit was and remains vexatious and reactive. [Pet. App. at 6-A.]

Moreover, the Fifth Circuit affirmed the district court's ongoing abstention without expressing a view as to the appropriateness of an interim award of attorney's fees or whether Petitioner is prevailing party pursuant to 42 U.S.C. §1988. *Id* at 4-A, n. 1. However, the appellate court noted

> it is clear to us that a district court, in the exercise of its discretion, might refuse to lift a stay without ever reaching the merits of an application for interim attorney's fees, *particularly in a situation where such an application is only one of numerous issues placed before a court in a motion to lift a stay*. Indeed, this is precisely what we today conclude the district court properly did. (Emphasis added.)

*Id*. at 5-A, n. 2.[3] Nevertheless, Petitioner's contentions that the district court abused its discretion and that this

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[3] The appellate court observed further that

> [w]e do not foreclose the possibility of a fact situation wherein a district court might properly be held to have abused its discretion in refusing to lift a stay precisely due to the propriety of an application for interim attorney's fees . . . however, such a fact situation is not presented by this case.

*Allen v. Louisiana State Board of Dentistry.*, [Pet. App. at 5-A, n. 2.]

Court should grant his petition are based on the presumption that this Court's jurisprudence mandates his entitlement to interim attorney's fees as a prevailing party pursuant to 42 U.S.C. §1988. As set forth below, Respondents disagree.

Petitioner relies upon *Texas Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989), *Independent Fed'n. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) and *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271 (6th Cir. 1991), in arguing that the decisions of the lower courts were incorrect. However, based on the distinguishing circumstances of the present case, the district court's ruling and appellate court's decision do *not* conflict with any of these cases. First, *Texas Teachers Assn.* focused on the determination of prevailing party status under 42 U.S.C. §1988 and did *not* involve the issue of *interim* attorney's fees. Also, in *Texas Teachers Assn.*, all issues of liability had been decided. In the present case, the state court proceedings are still ongoing and the district court, based on its abstention, has yet to address the issues of liability and prevailing party status, on any of Petitioner's 24 civil rights claims. Thus, until the district court has determined liability and considers whether Petitioner has prevailing party status, it is premature to say that either the district court or appellate court are in conflict with *Texas Teachers Assn.*

Likewise, *Allen III* is not in conflict with *Morscott, Inc.* and *Zipes*. These cases stand for the proposition that 42 U.S.C. §1988 is not discretionary when prevailing party status has been established. Insofar that the district court has not reached the issue of prevailing party status, based

on its stay, the Fifth Circuit's reference to the discretionary nature of attorney's fees under §1988 does not conflict with the above decisions.

> Moreover, *Allen III* is *not*, as alleged by Petitioner, in conflict with the holding of seven other circuit courts of appeals. *Vide*: *Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985); *Lumen Const., Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691, 698 (7th Cir. 1985); *Stathos v. Bowden and Exeter-West Regional Sch. v. Pontarelli, supra*, [728 F.2d 15] (1st Cir. [1984]); and, most recently, Judge Feinberg's analysis in *Temple of the Lost Sheep v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) ("the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court"), *cert denied*, 112 S. Ct. 193 (1991).

[Pet. at 10-11.] The above-cited appellate cases stand for the proposition that a federal court should stay, rather than dismiss, litigation pending final adjudication of all state issues. The cases do not stand for the proposition being urged by Petitioner that a federal court abuses its discretion *per se* by refusing to lift a stay to consider federal §1983 claims piecemeal.

### B. Lifting The Stay To Determine Whether Petitioner Is Entitled To Interim Attorney's Fees Will Result In Unnecessary Piecemeal Litigation Which Abstention Was Designed To Avoid.

This Court has held that the *Colorado River* test should "be applied in a pragmatic, flexible manner with a

view of the realities of the case at hand." *Moses H. Core Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983).[4] Petitioner's impassioned insistence on lifting the stay is blind to the difficulties posed by his request. In essence, the district court will not be able to summarily grant Petitioner interim attorney's fees, but rather, as set forth below, it will be necessary for the parties to litigate piecemeal several issues which relate to his request.

In order for the district court to award interim attorney's fees, it would have to do the following:

1. Determine whether the Board or any of the individual Respondents, are liable under §1983;

2. Determine whether Petitioner is a "prevailing party" within the meaning of 42 U.S.C. §1988;

3. Determine which of the Respondents, sued in both their individual and official capacities, are liable under §1983, and apportion the liability of each; and

4. Apply the twelve-factor test of *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) and determine the amount of attorney's fees to be awarded.

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[4] Throughout these proceedings, Petitioner has relied upon his alleged impoverishment cited in his affidavit as a basis for lifting the stay. While Respondents have yet to engage in discovery concerning Petitioner's alleged financial status because of the district court's stay, Respondents contest his alleged poverty and note his reluctant admission that his practice has continued without interruption throughout these proceedings.

By reviewing each of these in turn, it is clear that the district court did not abuse its discretion in refusing to lift its stay.

**1. Liability Under §1983**

Although the district court did not entertain Petitioner's motion for partial summary judgment on §1983 liability, Respondents wish to briefly note their disagreement that Petitioner can establish §1983 liability through application of res judicata to the Louisiana Supreme Court's decision on his commingling due process claim. As noted by the Fifth Circuit in *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982) the federal district court in a §1983 action can only grant the same preclusive effect to state court judgments as would the courts of the judgment-rendering state. Thus the federal district court must "determine the preclusive effect of the Louisiana judgment by resort to the Louisiana law of res judicata." *Id.* at 1036.

Petitioner made no showing to the district court, appellate court or to this Court, that he is entitled to res judicata under Louisiana law.[5] Moreover, Respondents point out that in order for a party to be bound by the Louisiana Supreme Court's decision, the party must have

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[5] The cases cited by Petitioner as "identical" to the present case deal with the doctrine of res judicata under New York and Florida common law, not the civil law of Louisiana. [Pet. at 11.] As the Fifth Circuit recognized in *Folsom*, " 'the concept of res judicata (in Louisiana) more freely permits relitigation of a controversy than its common law counterpart.' " (Citation omitted.) *Folsom*, 681 F.2d at 1036.

been a party to the earlier proceedings. *Sider v. Valley Line*, 857 F.2d 1043, 1046 (5th Cir. 1988). In the present case, only the Board was a party to the state appeal. Thus, while the Board disputes that res judicata applies, and reserves its right to litigate that issue in the proper proceedings, it is clear that res judicata cannot apply to the remaining thirteen Respondents who are being sued in both their individual and official capacity, none of whom were party to the state appeal.

**2. Prevailing Party Status**

Before the district court can award interim attorney's fees, it must determine whether or not Petitioner is a "prevailing party" for purposes of §1988. He must be able to demonstrate to the district court that he has succeeded "on any significant issue in litigation which achieves some of the benefit [he] sought in bringing the suit." *Texas Teachers Assn. v. Garland School District*, 489 U.S. 791-792 (1989). A mere "technical victory" will not suffice; there must be a "material alteration of the legal relationship of the parties." *Id.* at 792-793.

Petitioner glibly asserts that he has proven everything necessary for the district court to declare him a prevailing party, but he has not. The district court has not reached this question yet, and for good reason. How, *at this stage*, can Petitioner's reversal be said to be anything but a "technical victory," which returns him to the beginning of the disciplinary proceedings, but grants him no other relief? How, exactly, has the "legal relationship" between these parties changed? At this stage, one cannot say. Petitioner remains charged with egregious violations

of professional conduct standards. He faces a rehearing on issues which are already supported by an extensive factual record. If, on rehearing, the charges against Petitioner are not sustained, then the prior reversal would be significant. On the other hand, if Petitioner suffers another adverse decision, and the decision is sustained on appeal, then the prior reversal is truly "technical." Respondents' point is that this inquiry is premature. If it is to be made at all, it should be made with the entire litigation in view, not just one part of one phase of it. The district court and appellate court correctly concluded that piecemeal adjudication of his §1983 commingling claim would be a waste of judicial resources.

### 3. Determination of §1983 Liability

Petitioner's argument ignores another critical issue which the application of res judicata to the Louisiana Supreme Court holding does not resolve and which the district court would be required to address: if Petitioner is entitled to attorney's fees, *by whom are they payable*? Petitioner has sued not only the Board as a body, but also twelve members of the Board and Wootan, both individually and in their official capacities. Of these numerous defendants, it is unknown if any of them are liable to Petitioner on his commingling claim. Yet, clearly before attorney's fees can be awarded, the district court must determine by whom they are payable, and it must apportion fees among liable defendants according to their official and individual liabilities.

In *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), a §1983 action against the sheriff and clerk of court of

Jefferson Parish, Louisiana, the Fifth Circuit distinguished between defendants whose conduct is impacted by a court's decree and defendants whose conduct is not, holding that only the former have been "prevailed upon" for the purposes of §1988. 868 F.2d at 168-169. Exactly which Respondents does Petitioner claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding.[6]

The district court would also have to determine which Respondents, if any, are liable for attorney's fees in their *individual capacities*. This Court has held that state officials may be individually liable for damages under §1983 and attorney's fees under §1988, upon a showing of objective or subjective bad faith. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975). Assuming, *arguendo*, that Petitioner may be characterized as a "prevailing party" on his due process commingling claim, and assuming that he is entitled to recover attorney's fees, the district court would then be required to determine whether Wootan or the twelve individual members of the Board acted in bad faith.

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[6] On appeal, Petitioner's solution was to hold the Board liable for attorney's fees now and reserve the liability issue of the remaining Respondents for a later date. Petitioner's Reply Brief, p. 5. [Resp. App. 18A.] However, it must be noted that the Board has been judicially determined to be an arm of the state and therefore immune from such liability. *Neuwirth v. Louisiana State Board of Dentistry*, 845 F.2d 553, 556 (5th Cir. 1988). Thus, the only Respondent against whom Petitioner could arguably request attorney's fees based solely on the Louisiana Supreme Court's ruling has immunity.

Petitioner's claim, apparently, is that all Respondents acted in bad faith. However, the district court would still have to conduct a separate hearing to determine the individual liability of the various Respondents on this particular §1983 claim in order to award interim attorney's fees. In short, it is clear that Petitioner cannot establish liability solely on the Louisiana Supreme Court's ruling and it will be necessary for the district court to engage in piecemeal litigation to determine if Petitioner is entitled to the relief he presently seeks.

Finally, any award of attorney's fees to Petitioner would have to be *apportioned* by the district court. In *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980), a §1983 action against a city and its police officers, the court held not only that a plaintiff may not recover attorney's fees from defendants held not liable, but also held that any fee award must be apportioned among those defendants held liable, according to the degree of their culpability. 621 F.2d at 1337-1338, 1340. Again, Petitioner's claims of bad faith in this action are all encompassing. Thus, the district court would be required to determine on its own which defendants must pay attorney's fees, and the portion of the total fee to be borne by each.

**4. Appropriate Amount of Attorney's Fees**

Assuming *arguendo* that Petitioner can establish §1983 liability based on the Louisiana Supreme Court's ruling, can identify which defendants are liable and which are not, and can establish that he is a "prevailing party" at this stage of the proceeding, interim attorney's

fees would still be inappropriate. A review of the applicable Fifth Circuit jurisprudence demonstrates the difficulty which would be encountered by the district court were it to try to carve out such an award at this stage. In *Brantley v. Surles*, 804 F.2d 321 (5th Cir. 1986), the Fifth Circuit followed its previous holding in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and outlined the factors which must be considered in determining an attorney's fee under §1988:

1) time and labor required;
2) novelty and difficulty of legal questions;
3) skill necessary to perform the legal services;
4) preclusion of other employment by the attorney;
5) the customary fee for such work;
6) whether the fee is fixed or contingent;
7) time limitations imposed under the circumstances;
8) amount involved and results obtained;
9) experience, reputation and ability of the attorney;
10) "undesirability" of the case;
11) nature and length of the attorney/client relationship; and
12) awards in similar cases.

804 F.2d at 325. The eighth factor, *amount involved and results obtained*, has been held to be one of the factors to which the district court must pay "special heed." *Copper-*

*Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 (5th Cir. 1980). Obviously, the amount involved and the results obtained from the Louisiana Supreme Court's ruling on Petitioner's due process commingling claim are impossible to gauge at this point. Only after Petitioner has concluded his state court proceedings will the district court be able to evaluate the significance, if any, of the favorable ruling Petitioner obtained from the Louisiana Supreme Court on the due process commingling claim.

Petitioner apparently dismisses any concern the trial court may have had over determining what fee to assess in this case, but the difficulty here is genuine. What, exactly, is the result Petitioner has obtained? If, after rehearing, the new panel sustains the charges, Petitioner's having obtained a rehearing is not as significant as it would have been if the charges had not been sustained. If, once the state proceedings are finished, Petitioner prosecutes this action and prevails on all, some, or none of his approximately twenty-four civil rights claims, is his due process commingling claim more significant, or less significant, than if he prevails on none of them? If he prevails on only a few of his federal claims, what weight should the trial court give to Petitioner's reversal then? What if Petitioner prevails in the district court on one or more of the claims which were rejected by the state court (and which he claims are preserved for re-litigation)? Clearly, the only way for the district court to determine *whether* Petitioner is entitled to attorney's fees and, if so, *how much*, is to take this litigation as a whole, *at its conclusion*. Only then can it properly assess the results obtained; only in the context of the *entire* litigation can the state court reversal of Petitioner's suspension be

placed in its proper context. *Johnson v. Georgia Highway Express, supra.* That time has not yet come.

Thus, the pendency of Petitioner's disciplinary rehearing, and the near certainty of another round of state court appeals, means that attempting to award attorney's fees now would embroil the federal courts in piecemeal adjudication of Petitioner's claims. As the Third Circuit held in *Williams v. Red Bank Board of Ed.*:

> . . . [I]t is difficult to see how the federal court could adjudicate [plaintiff's] constitutional claims and attorneys' fees until *after* all disciplinary proceedings have been finally completed. How could the damages be calculated, for example, until it is known whether [plaintiff] is to be "acquitted," discharged, or suffer a reduction in salary?

662 F.2d 1008, 1024 (3d Cir. 1981). [Emphasis in original]. Furthermore, *Williams* has been specifically endorsed by this Court. Contrary to Petitioner's assertions, this Court in *Deakins v. Monaghan*, 484 U.S. 193 (1988), explicitly approved abstention and the logic of *Williams*. In *Deakins*, this Court stated as follows:

> The Third Circuit rule [regarding abstention] is sound. It allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts "to assume jurisdiction where jurisdiction properly exists." (Citations omitted.)

*Id.* at 202-203. (*See also* the concurring opinion of Justices White and O'Connor in which Justice White specifically discusses the need for the federal court to abstain until

the *conclusion* of the state proceedings pursuant to *Colorado River*. *Id.* at 210, n. 5.)

## CONCLUSION

Based on the above, Respondents submit that the Petition should be denied. The district court did not abuse its discretion in refusing to lift the stay until the state proceedings are completed. Petitioner's argument that the existing jurisprudence mandates that the district court was required to lift the stay is simply wrong. Without regard to the havoc he would create in the district court by litigating his claims piecemeal, Petitioner seeks license to shuffle back and forth between the state proceedings and the district court whenever the state proceedings produce a result which favorably relates to his federal suit. Such a scheme severely threatens the orderly administration of parallel proceedings and defeats the purpose of abstention. By applying the principles of *Colorado River* "in a pragmatic, flexible manner with a view to the realities of the case at hand," the district court properly decided to deny Petitioner's motion to lift the stay.

Respectfully submitted,

CORNELIUS R. HEUSEL
S. MARK KLYZA
KULLMAN, INMAN, BEE, DOWNING & BANTA
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

*Counsel for Louisiana State Board of Dentistry, et al.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | | |
|---|---|---|
| DR. WILLIAM D. ALLEN | * | CIVIL ACTION: |
| VERSUS | * | JURY TRIAL REQUESTED |
| LOUISIANA STATE BOARD OF DENTISTRY: DR. J. ROY CHUSTZ; DR. N. FRANCIS LABORDE; GUY WOOTAN; KENNETH M. BOUDREAUX, R.D.H.; DR. LIONEL L. de la HOUSSAYE; DR. RUSSELL R. DiMARCO; DR. MERRICK A. DUGAS, JR.; DR. BENNETT P. FONTENOT; DR. RALPH B. KING, JR.; DR. JOSEPH M. KOCHANSKY; DR. HERMAN O. BLACKWOOD, III; DR. DAVID E. SIMMONS; AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES | * | NUMBER 86-0623 |
| | * | SECTION "E" |
| | * | MAGISTRATE 1 |

SECOND SUPPLEMENTAL
AND AMENDED COMPLAINT

COMPLAINT FOR DEPRIVATION
OF CONSTITUTIONAL RIGHTS

Complainant desires to amend and supplement his original complaint in its entirety to read as follows:

1.

This is an action for injunctive and declaratory relief, and for money damages, both compensatory and punitive, as authorized by 42 U.S.C. § 1983 to secure rights, privileges, and immunities established by the First, Fourth, and Fourteenth Amendments to the United States Constitution.

2.

The jurisiction [sic] of this Court is invoked under 28 U.S.C. § 1331(a), 1343(3), and (4). Plaintiff also seeks injunctive relief, and such further relief as is warranted by 28 U.S.C. § 2201-2202.

3.

Complainant, William D. Allen, a citizen of the United States, is a resident of lawful age of the Parish of East Baton Rouge, Louisiana.

4.

Defendants are as follows:

1. Mr. Guy Wootan, resident of and domiciled in New Orleans, Louisiana, individually and in his official capacity as agent of the Louisiana State Board of Dentistry;

2. Louisiana State Board of Dentistry, a Division of the Department of Health and Human Resources of the State of Louisiana, whose domicile is in the Parish of

Orleans, New Orleans, Louisiana and the members of the Board who are listed as follows:

3. Dr. J. Roy Chustz, resident of and domiciled in Baton Rouge, Louisiana, individually and in his official capacity;

4. Dr. N. Francis Laborde, resident of and domiciled in Marksville, Louisiana, individually and in his official capacity;

5. Mr. Kenneth M. Boudreaux, R.D.H., a resident of and domiciled in New Iberia, Louisiana, individually and in his official capacity;

6. Dr. Lionel L. de la Houssaye, resident of and domiciled in Lake Charles, Louisiana, individually and in his official capacity;

7. Dr. Russell R. DiMarco, resident of and domiciled in Gretna, Louisiana, individually and in his official capacity;

8. Dr. Merrick A. Dugal, Jr., a resident of and domiciled in Houma, Louisiana, individually and in his official capacity;

9. Dr. Bennett P. Fontenot, resident of and domiciled in Breaux Bridge, Louisiana, individually and in his official capacity;

10. Dr. Ralph B. King, Jr., resident of and domiciled in Monroe, Louisiana, individually and in his official capacity;

11. Dr. Joseph M. Kochansky, resident of and domiciled in Lafayette, Louisiana, individually and in his official capacity;

12. Dr. David E. Simmons, resident of and domiciled in New Orleans, Louisiana, individually and in his official capacity;

13. Dr. James P. Tomaszewski, resident of and domiciled in Slidell, Louisiana, individually and in his official capacity; and

14. Dr. Herman O. Blackwood, III, resident of and domiciled in Shreveport, Louisiana, individually and in his official capacity.

5.

The defendant Louisiana State Board of Dentistry has revoked plaintiff's license to practice dentistry in the State of Louisiana under the provisions of La. R.S. 37:751-792.

6.

The charges filed against the complainant by the Louisiana State Board of Dentistry leading to the revocation of his license were filed in bad faith in order to deter, intimidate, harrass [sic], and punish plaintiff for his commercial advertising of his dental practice, specifically his advertising of dentures, which greatly decreases the price of dentures normally charged by other dentists in the area, all in violation of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

7.

Plaintiff wishes to advertise free initial consultations but has been prevented from doing so by the Louisiana State Board of Dentistry's enforcement against him of La. R.S. 37:775 (7). This statutory provision and the Board's enforcement thereof abridge plaintiff's first and Fourteenth Amendment right to commercial free speech and is therefore unconstitutional on its face and as applied.

8.

Plaintiff wishes to advertise dentures in the local Baton Rouge papers by the use of a pictorial representation of a bridgework or denture. Such advertising of dentures is prohibited by La. R.S. 37:775 (10) and the defendant Louisiana State Board of Dentistry has sanctioned such advertising in the past. This statutory provision and the threat of enforcement thereof abridge plaintiff's First and Fourteenth Amendment right to commercial free speech and is therefore unconstitutional on its face.

9.

The defendants' agent and attorney, Guy Wootan, suggested to Brenda Gremillion, a former employee of Dr. William D. Allen, that she remove confidential patient charts from the offices of Dr. Allen, copy these charts, and turn the copies over to him for use in prosecuting Dr. Allen. Said Guy Wootan also caused and provoked former employees of Dr. Allen, namely, Terry Marino and Brenda Gremillion, to return to the offices of Dr. William

D. Allen and obtain by means of a burglary confidential information from Dr. Allen's appointment book, to copy this information, and to turn the names of patients, dates, and procedures over to him for use in prosecuting Dr. Allen.

10.

The said Guy Wootan and Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, in investigating and bringing charges under the hereinabove referred to statutes, have used their authority in an unfair and unconstitutional manner, specifically, but not exclusively as follows:

(a). By continually calling the office of Dr. Allen and questioning his employees in an attempt to learn whether any employee is dissatisfied and willing to give unfavorable testimony against his or her employer;

(b). By specifically excluding any favorable witnesses for Dr. Allen, but concentrating their efforts on employees who have been discharged and who are biased against Dr. Allen for personal reasons not connected with or having any relation to his professional ability;

(c). By harrassing [sic], intimidating, and invading the privacy of proposed favorable witnesses for Dr. Allen and by maligning said employees, specifically, but not exclusively, Linda Rachel Davidson, by direct contact with the employer of said employee, wherein Mr. Wootan told Rachel Davidson's employer an outrageous tale

about her and said that he was having her followed and threatened to have her cited for contempt, all of which was designed to intimidate Rachel Davidson and to frighten her as a witness for Dr. Allen; and

(d). By obtaining information on the personal life of Dr. William D. Allen and attempting to use such information in a disparaging and defamatory manner where such facts and information have no relation to complainant's practice of dentistry.

11.

Complainant has been forced to defend numerous allegations made and prepared by defendants without adequate substantiation and the defendants have refused to amend the charges to be consistent with the statements of the defendants' own witnesses; and with such broad and sweeping charges defaming complainant's character, defendants have harassed and intimidated complainant and denied him the usual and customary safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

12.

The license revocation procedures of the Louisiana State Board of Dentistry denied plaintiff due process of law for the following reasons:

(a). The charges brought against plaintiff were brought by disgruntled former employees of plaintiff who met with Mr. Guy Wootan, the Louisiana State Board

of Dentistry's attorney and investigator, informing him of various alleged infractions of the State Dental Practice Act. No Adequate effort was made by Mr. Wootan, by any member of the Board, or by any other agent of the Board, to substantiate the allegations of these former employees. No patient allegedly treated by these employees was contacted by the Board or by any of its agents, including Mr. Guy Wootan, to verify the complaints of the employees before the filing of the charges. The failure of the Board to substantiate the charges against Dr. Allen is contrary to La. R.S. 37:779 and contrary to fundamental requirements of fair play guaranteed by the Due Process Clause of the Fourteenth Amendment.

(b). The Louisiana State Board of Dentistry delegated the decision to institute license revocation proceedings against Dr. William D. Allen to its legal counsel, Mr. Guy Wootan. No adequate review of Mr. Wootan's determination to charge Dr. Allen with violations of the Louisiana Dental Practice Act was made by any State Board member or by any internal review mechanism which would prevent the bringing and filing of unsubstantiated charges against Dr. William D. Allen.

(c). The charges brought against plaintiff were prepared by Mr. Guy Wootan, the Louisiana State Board of Dentistry's legal counsel and its sole investigator at the time. The charges are grossly inflated, reciting alleged violations which Mr. Wootan knew or should have known had not occurred.

13.

Plaintiff was denied due process of law at the administrative hearing held on February 21, 1986, to February 24, 1986, for the following specific, but not exclusive, reasons:

(a). The conduct of the hearing by the Chairman, Dr. Lionel L. de la Houssaye, showed overwhelming bias in favor of the prosecution. The hearing panel's anger and antagonism toward defense counsel was inconsistent with the impartiality demanded by due process of law.

(b). The denial of Dr. Allen's request to adduce by deposition the favorable testimony of sick witnesses and the refusal of Dr. de la Houssaye to allow defense counsel to make their proffers of proof at the conclusion of the administrative hearing denied Dr. Allen a fair opportunity to put on his defense, contrary to due process of law.

(c). The refusal of the hearing panel to allow defense counsel to call Brenda Gremillion as a defense witness denied Dr. Allen an opportunity to prove that the proceeding against him was tainted by Guy Wootan's request for specific information from Terry Marino and Brenda Gremillion which incited them to commit the felony of burglary of Dr. William D. Allen's office. The sole reason for the illegal entry into Dr. Allen's office was to obtain the names of patients, dates, and procedures from Dr. Allen's appointment book in order to help Mr. Wootan prosecute Dr. Allen.

(d). The refusal of the hearing panel to allow defense counsel to file a motion to dismiss and/or to

strike the charges against Dr. Allen, urging that the prosecution of Dr. Allen was the fruit of an illegal breaking and entering of Dr. Allen's office for the sole purpose of obtaining evidence to be used by the Board's counsel, Guy Wootan, and Dr. de la Houssaye's purported striking of said motion from the record of the administrative proceeding so obstructed the assertion of Dr. Allen's Fourth and Fourteenth Amendment rights against unreasonable searches and seizures as to constitute a denial of due process of law.

(e). Each member of the hearing panel, Chairman Lionel L. de la Houssaye, and Drs. Russell R. DiMarco, Merrick A. Dugall, Jr., and N. Francis Laborde had a direct personal economic interest in the outcome of the administrative proceeding as it would affect the outcome of the federal civil rights action that had previously been filed against the Louisiana State Board of Dentistry and the members of the hearing panel. This personal interest and the appearance of impropriety required each member of the hearing panel to recuse himself from Dr. Allen's case, yet the members of the hearing panel insisted on trying Dr. Allen's case and denied his motion to recuse, all contrary to the fundamental requirements of procedural due process guaranteed to complainant, Dr. William D. Allen, by the Due Process Clause of the Fourteenth Amendment.

14.

The principal evidence relied upon by Mr. Guy Wootan, the Louisiana State Board of Dentistry's agent, attorney, and prosecutor, in framing the charges against

Dr. Allen was derived from an illegal entry by Terry Marino and Brenda Gremillion into Dr. Allen's office around 10 P.M. on Monday, August 26, 1985. The sole reason for the illegal entry into Dr. Allen's office was to obtain information on patients from Dr. Allen's appointment book to be used in prosecuting Dr. Allen because of the indicated request of Guy Wootan, who acts under color of state law and as agent of the Louisiana State Board of Dentistry.

15.

The action of the hearing panel, namely, Drs. Lionel L. de la Houssaye, N. Francis Laborde, Russell R. DiMarco, and Merrick A. Dugal, Jr., in knowingly utilizing the fruits of the illegal entry into Dr. Allen's office shows a reckless disregard for the rights of privacy of all citizens, including the complainant, Dr. William D. Allen, protected by Article I, § 5 of the Louisiana Constitution of 1974 and the Fourth Amendment to the United States Constitution made binding on the states and their subordinate agencies through the Fourteenth Amendment.

16.

The conduct of the Louisiana State Board of Dentistry's attorney-prosecutor, Mr. Guy Wootan, shows a reckless disregard for the truth by not requiring adequate substantiation of the charges against Dr. William D. Allen and shows an overzealous drive to convict Dr. Allen regardless of the true facts. Mr. Wootan knew that certain of Dr. Allen's patients, who had no bias or interest in the case, had denied the charges, yet he never informed

either the Board's President, the hearing panel, or Dr. Allen's counsel of this information. Mr. Wootan's wanton obstruction of the truth justifies imposition of punitive damages against him, individually and as agent of the Louisiana State Board of Dentistry.

17.

The lack of supervision and control on the part of Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, and of the Board generally over its attorney-prosecutor, Guy Wootan, shows a reckless disregard of the rights of the plaintiff, Dr. William D. Allen, justifying imposition of punitive damages against the defendants, individually, and in their official capacities.

18.

The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutional and adjudicative functions denied plaintiff due process of law.

19.

The hearing panel's final decision of March 24, 1986, drafted by the Board's prosecutor, Guy Wootan, capriciously disregards the testimony of the Board's own witnesses and falsely characterizes the testimony of defense witnesses, including Rachel Davidson, Rosa Jones, and Myrtle Douglas, depriving Dr. William D. Allen of due process of law.

20.

Plaintiff was denied due process of law at the February, 1986, administrative hearing and again at the partial rehearing on June 21, 1986, held pursuant to the judgment of the Honorable Judge Steven R. Plotkin of the Civil District Court of Orleans Parish, Louisiana, dated May 2, 1986, by the refusal of Dr. Lionel L. de la Houssaye, Chariman [sic] of the hearing panel, to allow defense counsel a full opportunity to cross-examine Dr. J. Roy Chustz, President of the Louisiana State Board of Dentistry, regarding his and the Board's failure to substantiate the charges brought against Dr. William D. Allen.

21.

Pursuant to 42 U.S.C. § 1983, plaintiff is entitled to a judgment declaring the Louisiana State Board of Dentistry's license revocation procedures unconstitutional as applied to plaintiff.

22.

Pursuant to 42 U.S.C. § 1983, plaintiff is entitled to a declaratory judgment declaring La. R.S. 37:775 (7) and La. R.S. 37.775 (10) unconstitutional on their face and as applied to plaintiff.

23.

Pursuant to 42 U.S.C. § 1983, plaintiff is further entitled to a permanent injunction (i) enjoining the Louisiana State Board of Dentistry, its employees and agents, from

enforcing La. R.S. 37:775 (7) and La. R.S. 37:775 (10); (ii) enjoining the Louisiana State Board of Dentistry from enforcing the provisions of the Louisiana State Dental Practice Act against plaintiff in any manner that denies plaintiff due process of law; (iii) enjoining defendants from calling employees of plaintiff and plaintiff's former employees and from constantly harassing, threatening, and intimidating his employees and from invading complainant's privacy, and attempting to deny plaintiff the right to advertise his dental practice as guaranteed by the First Amendment to the United States Constitution; and (iv) otherwise implementing appropriately in scope and form the declaratory judgment prayed for above.

24.

Petitioner claims as special damages monies expended in defense of the proceedings entitled "Louisiana State Board of Dentistry vs. Dr. William D. Allen," which was a disciplinary proceeding brought by the Louisiana State Board of Dentistry and which special damages amount to the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($1,500,000.00), which sum includes attorney fees, expenses, and loss of revenue to Dr. Allen's dental practice.

25.

The defendants are liable, in solido, for compensatory damages to the plaintiff as follows:

| | | |
|---|---|---|
| a. | Invasion of privacy | $3,000,000.00 |
| b. | Denial of due process | 2,000,000.00 |
| c. | Defamation of character | 3,000,000.00 |
| d. | Denial of first amendment rights | 1,000,000.00 |
| e. | Mental pain and anguish | 3,000,000.00 |

26.

The defendants are liable, in solido, for punitive damages to the plaintiff as follows:

| | | |
|---|---|---|
| a. | Invasion of privacy | $5,000,000.00 |
| b. | Denial of due process | 5,000,000.00 |
| c. | Defamation of character | 5,000,000.00 |
| d. | Denial of first amendment rights | 5,000,000.00 |

The plaintiff expressly reserves the right to join as parties defendant any liability insurance carriers, as yet unknown to the plaintiff, that have issued policies insuring any of the defendants, including the Louisiana State Board of Dentistry, and any malpractice carrier insuring the law practice of Mr. Guy Wootan, the Louisiana State Board of Dentistry's attorney and prosecutor.

27.

Plaintiff is entitled by reason of 42 U.S.C. § 1988 to reimbursement of the costs of this action and the reasonable attorney's fees thereof.

28.

The plaintiff requests that this action be tried before a jury of his peers.

WHEREFORE, plaintiff prays that this Court:

1. Let the original complaint be supplemented and amended as set forth herein.

2. Issue a declaratory judgment (i) declaring La. R.S. 37:775 (7) unconstitutional on its face and as applied to plaintiff; (ii) declaring La. R.S. 37:775 (10) unconstitutional on its face and as applied to plaintiff; (iii) declaring the Louisiana State Board of Dentistry's license revocation procedures unconstitutional as applied to plaintiff.

3. Issue a permanent injunction (i) enjoining the Louisiana State Board of Dentistry, its employees and agents, from enforcing La. R.S. 37:775 (7) and La. R.S. 37:775 (10); (ii) enjoining the Louisiana State Board of Dentistry from enforcing the provisions of the Louisiana State Dental Practice Act against plaintiff in any manner that denies plaintiff due process of law; (iii) enjoining defendants from calling employees of plaintiff and plaintiff's former employees and from constantly harassing, threatening, and imtimidating [sic] his employees and from invading complainant's privacy; and (iv) otherwise implementing appropriately in scope and form the declaratory judgment prayed for above.

4. After a jury trial on the merits, enter a judgment against the defendants in solido for such special, compensatory, and punitive damages as the jury determines are owing for invasion of plaintiff's rights to privacy, due process, defamation of character, mental pain and anguish, and freedom of commercial speech.

5. Grant plaintiff all costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988, and such other and further relief as may be just and equitable.

Respectfully submitted,

PARKER & PARKER

BY: /s/ J. Peyton Parker, Jr.
J. PEYTON PARKER JR.
TRIAL ATTORNEY
1111 S. FOSTER DRIVE,
SUITE D
BATON ROUGE, LOUISIANA
70806
TELEPHONE: (504) 927-5280

CERTIFICATE

I HEREBY CERTIFY THAT A COPY
(illegible)

23rd June, 19 86

BY: /s/ J. Peyton Parker, Jr.
J. PEYTON PARKER, JR.

Petitioner's Reply Brief
to the Fifth Circuit

* * *

*Fourth.* Appellees ask, Brief, p. 23:

> "Exactly which defendants does Allen claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding."

The obvious answer, sufficient for this appeal, is defendant Louisiana State Board of Dentistry. Whether other defendants are liable for attorney's fees, and to what extent, must await legal determinations yet to be made by the district court, subject to review here. The district court did not entertain Allen's motion for partial summary judgment on § 1985 liability. We agree with Appellees that this "is not an issue which is properly before this Court." Brief of Appellees, p. 20.

Nor are the *"Mysteries of the Eleventh Amendment," Brennan v. Stewart,* 834 F.2d 1248, 1251 (5th Cir. 1988) (per Gee, J.), yet a part of this case. So too, there are no immunity questions before your Honors at this time. Hence we do not address these issues.

* * *